B Babrick
GGM

00014

DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-184506 DATE: March 9, 1977

MATTER OF: Claim of Nabisco, Inc. Under the Processor Wheat Marketing Certificate Program

DIGEST: Claim by Nabisco for cost of wheat marketing certificates, under regulations implementing transition relief provision of Agriculture and Consumer Protection Act of 1973, is denied. Claim is based on quantity of cookies on hand or in trade channels on June 30, 1973. Department of Agriculture does not consider such items "food products" as defined in regulations, applying the term only to first product manufactured from wheat for which certificate was originally purchased. Agriculture's interpretation is not unreasonable or inconsistent with regulation or purpose of Act and has been applied consistently.

On April 8, 1976, Nabisco, Inc. filed a claim with this Office against the United States in the amount of $1,352,385.42 ($1,160,553 principal plus $191,832.42 interest). This claim arose out of the application of the regulations governing the transition provisions of the Processor Wheat Marketing Certificate Program, administered by the Department of Agriculture. We have requested and received the views of the Department on the merits of Nabisco's claim, as well as Nabisco's response to those views.

The Agricultural Adjustment Act of 1938, as amended, provided for a wheat marketing allocation program. 7 U.S.C. §§ 1379d-j (1970). As a means of regulating commerce in wheat and assuring the farmer a fair price for his crop, all processors of wheat were required to purchase domestic marketing certificates for wheat processed into food products, equivalent to the number of bushels of wheat contained in the food products. This requirement was suspended for 5 years as of July 1, 1973, by the Agriculture and Consumer Protection Act of 1973, Pub. L. No. 93-86, 87 Stat. 228, August 10, 1973. Section 1(10) of the 1973 act authorized the Secretary of Agriculture:

> "* * * to take such action as he determines to be necessary to facilitate the transition from the certificate program provided for under section 379d [of the Agricultural

> Adjustment Act of 1938 as amended, 7 U.S.C. § 1379d] to a program under which no certificates are required. Notwithstanding any other provision of law, such authority shall include, but shall not be limited to the authority to exempt all or a portion of wheat or food products made therefrom in the channels of trade on July 1, 1973, from the marketing restrictions in subsection (b) of section 379d [7 U.S.C. § 1379d(b)], or to sell certificates to persons owning such wheat or food products made therefrom at such price and under such terms and conditions as the Secretary may determine. Any such certificate shall be issued by the Commodity Credit Corporation. Nothing herein shall authorize the Secretary to require certificates on wheat processed after June 30, 1973." 7 U.S.C. § 1379g(c)(Supp. V, 1975).

Because section 1(10) was enacted more than a month after the date on which the suspension of the certificate program was to be effective, the Department decided that a relief program was necessary to insure an orderly transition to a program under which certificates were no longer required. As explained by the Department of Agriculture in its letter commenting on Nabisco's claim, the processors of wheat, knowing that the bill to suspend the certificate program might still be pending after July 1, pointed out that if no provision were made for a transition period, they would have to add the cost of required certificates to the selling price of wheat processed by them after July 1 until enactment of the bill. Potential purchasers, however, would not buy wheat products at that price, knowing that by waiting until the enactment of the bill, they could buy the wheat products at a price free of the cost of certificates. The processors said that the result would be that, unless a transition program were instituted to keep the "pipeline full," they would cease processing wheat for sale between July 1, 1973, and the enactment date of section 1(10).

Agriculture agreed that transition relief would be necessary to prevent the closing of flour mills, bakeries, and other users of flour. Section 1(10), quoted above, gives Agriculture authority to provide transition relief by making all wheat, or food products made therefrom, which were in the channels of trade on July 1, 1973, free from certificate liability.

Regulations, issued by the Administrator, Agricultural Stabilization and Conservation Service, on August 21, 1973, established the relief program. 7 C.F.R. § 777.21(a)(1976) provides generally that "* * * no certificates need be acquired by food processors as to certain wheat processed into food products prior to July 1, 1973 * * *." Transition relief was provided under 7 C.F.R. § 777.21(b) specifically for:

> "(i) Flour or other food products in inventory as of 11:59 p.m. local time, June 30, 1973, in the processor's plant and such food products which the processor owns and has in storage in a warehouse as of such time. (ii) Flour or other food products in transit from the processor's plant as of 11:59 p.m. local time, June 30, 1973, and not received until after such time at the destination indicated on the bill of lading, manifest, or other similar document issued on shipment from the plant * * *."

By filing processing reports with the Director, Prairie Village Commodity Office of the Agricultural Stabilization and Conservation Service (ASCS), on or before September 30, 1973, processors were able to obtain refunds for the cost of certificates previously purchased for such products. 7 C.F.R. § 771.21(c).

On September 25, 1973, Nabisco filed processing reports claiming a certificate refund for 1,547,404 bushels of wheat which had been processed into cookies, crackers and snacks, which were in channels of trade immediately prior to July 1, 1973. The Director, Prairie Village ASCS Commodity Office, approved the claim, and Nabisco was paid. Subsequently, the Department of Agriculture determined that Nabisco was not entitled to the refund and demanded repayment, claiming that cookies, crackers and snacks were not "food products" within the meaning of the regulations. Nabisco disputed the Government's right to recover the refund. The Department of Agriculture then recovered the refund, by means of set-off, implemented through use of the Army Hold-up List. We issued a decision holding that this procedure was authorized under Federal Claims Collection Standards but we did not express an opinion on the merits of the matter. Pursuant to this decision, $1,160,553 (plus applicable interest), was withheld from an amount due Nabisco under a contract with the Department of the Army. As a result, Nabisco has filed this claim against the United States.

Nabisco and Agriculture agree that the issue in this claim is whether cookies, crackers and snacks are "food products" within the meaning of the regulations which govern the Processor Wheat Marketing Certificate Program. If they are not "food products," as defined, then they are not eligible for transition relief.

7 C.F.R. § 777.3(b)(1976) defines "food product" as:

> "(1) Any product processed in whole or in part from wheat, irrespective of whether such product is actually used for human consumption, except such products as are defined herein as non-food products. Such food products shall, except as provided in paragraph (c)(3) of this section, include but not be limited to the following:

"(i) Flour, as defined herein. (See §§ 777.18 and 777.19 for special provisions on flour second clears which are not used for human consumption.)

"(ii) Wheat which is boiled, steeped, or commercially sprouted.

"(iii) Any breakfast cereal.

"(iv) Any beverage.

"(v) Cracked wheat (wheat grits), ground wheat, crushed wheat, rolled wheat, pearled wheat, or flaked wheat (toasted or untoasted, other than breakfast cereal) or such other similarly processed wheat as may be designated by the Administrator, except to the extent that the total product of the wheat processed is used in or marketed as animal feed or other nonfood product. To qualify as ground wheat not more than 70 percent of such total product shall pass through a No. 8 sieve, and not more than 30 percent of such total product shall pass through a No. 20 sieve."

"Flour" is defined in 7 C.F.R. § 777.3(d)(1976) as follows:

> "'Flour' means all flour (including flour clears) processed in whole or in part from wheat and shall include whole wheat or graham flour, Durum flour, malted wheat flour, stone ground flour, self-rising flour, semolina, farina and bulgur."

Nabisco argues first that the regulations are consistent with the view that the term "food products," as defined, includes items such as cookies, crackers, and snacks, which are processed indirectly from wheat and, conversely, that the regulations are not consistent with an interpretation that only direct products of wheat can be "food products." Second, Nabisco points to the basic definition in the statute of "food products" as "* * * flour * * * and any other product composed wholly or partly of wheat which the Secretary may determine to be a food product * * *," and to the statutory direction to provide transition relief for "* * * wheat or food products made therefrom * * *." Nabisco, while recognizing the Secretary's discretion in defining "food product", points out that the statute does not require an administrative definition which includes only items processed directly from wheat as food products, and suggests that in going beyond the explicit statutory

requirement, the Secretary exceeds his discretion. Finally, Nabisco points out that there is no policy reason for denying it a refund for cookies, crackers, and snacks, in that the refund will neither set an undesirable precedent nor result in an inequitable advantage to Nabisco.

At our request, the Department has responded in detail to the arguments by Nabisco. The Department's position, generally stated, is as follows:

> "The definition of food product has been in the regulations practically unchanged since the inception of the program. In administration of the program, it has always been considered that liability for acquisition of certificates was incurred based on the time the wheat was processed into flour and not based on the time flour was further processed into bakery products. Thus certificates were due under Section 777.11(b) 45 days after the end of the processing report period in which the wheat was processed into flour. Interest was due if the certificates were not acquired and surrendered within 15 days after the close of the processing report period. Nabisco, Inc. acquired and surrendered certificates and paid interest based on this time schedule and not on the assumption that the end of the report period occurred after the flour was manufactured into bakery products. Nabisco, Inc. has followed this practice since 1964 and only now has raised this issue.
>
> "The issue, of course, relates to the use of the definition of food product in another context - namely certificate refunds, not certificate purchases. The principle is the same, however CCC [Commodity Credit Corporation] has uniformly followed the same approach in its interpretation of 'food product' in making refunds to other processors. For example, there were no allowed refunds under Section 777.21 of the regulations for such items as frozen bread dough, refrigerated biscuits, as well as cookies, crackers, and snacks which were prepared by other processors.

* * * * *

"We are of the opinion that the regulations implementing the transition provisions of the Processor Wheat Marketing Certificate Program as contained in the Agriculture and Consumer Protection Act of 1973 were administered by the Department in accordance with the applicable statutory language. Furthermore, such transition relief was administered in a consistent manner so that all cookies, crackers, snacks, etc. on hand on July 1, 1973, were excluded from transition relief. Similarly all claims for transition relief for dry mixes on hand on July 1, 1973, were approved for refund of the certificate cost."

The essential questions, as we view this matter, are whether Agriculture has adopted a regulation which is within the scope of its administrative discretion and whether it has applied the regulation consistent with the purpose of the program. We believe that Agriculture has met these conditions and that the claim must be denied.

Nabisco relies first on its construction of the words of the definition of "food products." In Nabisco's view, Agriculture is erroneously excluding cookies, crackers, and snacks from the scope of the definition by reading in a requirement that the products be "processed directly from wheat." The word "directly" is not part of the definition.

The words "processed from wheat" are ambiguous in this respect. They are not inconsistent with the interpretation adopted by Agriculture, nor do they compel the interpretation urged by Nabisco. Nabisco's interpretation, no less than Agriculture's, relies on an inference about the meaning of the definition which goes beyond the necessary implications of the words "processed from wheat." Nabisco's inference is that food products include substances which at any stage of their manufacture have been processed from wheat or a wheat product. This is a permissible interpretation. On the other hand, Agriculture's interpretation is equally valid. Agriculture says food products are covered only at the time they are first processed from wheat and not when they have undergone transformation into bakery products. (The reason for choosing that point of time in the processing cycle will be discussed, infra.)

Therefore the argument by Nabisco that the words of the regulation "should be read as they are written" is not dispositive. Where the definition is consistent with the interpretation adopted by the administering agency, as is the case here, that interpretation is entitled to great weight.

Nabisco argues that the Department's interpretation of the regulation goes beyond the discretion given the Secretary by the statute to define "food product." We find no basis for concluding that the definition as written and applied goes beyond the bounds of permissible discretion.

Nabisco contends further that the Department's treatment "dry mixes" (such as cake mixes) as "food products" is "flatly inconsistent" with its treatment of cookies, crackers, and snacks, because blending flour into dry mixes, according to Nabisco, causes it to lose its identity as flour, to be physically altered, and to become irretrievable. Thus, in Nabisco's view, if the Department were consistent in its position that further processing of flour by baking it into cookies takes it out of the "food product" category, it would also have to hold that cake mixes are not food products because "* * * the flour in dry mixes is altered in the same manner as flour in cookies, crackers, and snacks * * *."

The Department disputes Nabisco's equation of cake mixes with cookies, crackers, and snacks, pointing out that the flour used in dry mixes "* * * retained its original characteristics as a dry granular product * * * whereas, in the case of bakery products the flour had been changed by further processing into a different product." The Department also points out that its treatment of dry mixes as eligible for transition relief was consistent with this view.

For purposes of this claim, we need not attempt to resolve this technical dispute concerning the physical effect of processing flour into dry mixes: the only question now before us concerns the treatment of cookies, crackers, and snacks. Moreover, assuming arguendo that Nabisco is correct in its assertion that dry mixes are no different from cookies in terms of the physical characteristics of the flour, the only logical consequence is that Agriculture should have treated both in the same manner and denied transition relief to manufacturers of mixes. To say, as Nabisco in effect urges, that both should have been treated as "food products" is to beg the question; unless Nabisco's reading of the definition of food products is accepted, it is equally possible to conclude that both cookies and dry mixes should have been treated as non-food products. In any event, as already noted, the propriety of the treatment of dry mixes is not here at issue.

Nabisco points out that the definition of "food product" includes "any breakfast cereal," whereas some breakfast cereals are processed from flour rather than from wheat, and suggests that, to the extent that breakfast cereals made from flour are included as

food products, Agriculture's treatment of cookies, crackers, and snacks is inconsistent with its treatment of breakfast cereals. Agriculture responds that in practice it has distinguished between breakfast cereals processed from wheat and those processed from flour. Nabisco in turn contends that there is no basis in the language of the regulation for that distinction. We do not regard the treatment of breakfast cereals as necessarily inconsistent with the regulatory scheme, for the same reasons, to be discussed hereafter, that the treatment of cookies, crackers, and snacks, is not necessarily inconsistent with it.

The definition of "food product" applicable to the transition relief program is that which applied to the original Processor Wheat Marketing Certificate Program, requiring the purchase of certificates by processors of wheat. Under the original program, however, the question now presented--whether cookies, crackers, and snacks (or cereals made from flour), are food products--could not have arisen. The necessary effect of the regulations, and Nabisco's acknowledged practice, was that certificates had to be purchased at the time wheat was first processed into flour, because flour is explicitly made a food product by the regulations. Further processing of the same flour, with respect to which certificates had already been purchased, into cookies, crackers, snacks, or breakfast cereal, would accordingly not have been subject to the requirement for purchase of certificates, and there would have been no occasion to consider the question whether cookies, crackers, and snacks, or breakfast cereals, to be made from flour, were also "food products."

Nabisco in effect concedes this, but argues that the treatment necessarily accorded cookies, crackers, and snacks under the Wheat Marketing Certificate Program is irrelevant to the issue in dispute because, prior to the transition relief period, "* * * this issue had been wholly immaterial to Nabisco," and that only now, in the context of the transition relief program, does it become significant. While it is true that until the transition relief program was instituted, there was no occasion to consider whether cookies and other flour-derived products were "food products," we do not agree that the transition relief program can be construed as if it were wholly independent of the Certificate Program.

That is, it is necessary, because of the ambiguity in the term "processed from wheat," to choose ultimately between two conflicting interpretations of the transition relief regulations. It is, in our view, relevant to consider, in making that choice, the fact that cookies, crackers, and snacks, as such, would not have been subject

to certificate liability under the Processor Wheat Marketing Program (because, as discussed above, the certificate liability necessarily attached at an earlier stage, when the flour in those products was processed from wheat). Agriculture's view, in effect, is that the intention of the transition relief program was to grant relief from certificate liability in a manner reflecting, as closely as possible, the way in which certificate liability was originally imposed. In this view, which we find convincing, relief for products such as cookies, crackers, and snacks was not intended, because those products were never, as such, considered to be subject to certificate liability.

Agriculture's interpretation of the regulation to exclude cookies, crackers, and snacks from eligibility for refund is, in our view, consistent with the intention of the transition relief program and with the language of the regulation. This interpretation, moreover, was applied consistently to all processors. The claim is therefore denied.

Acting Comptroller General
of the United States